

No. 15929

In the United States
COURT OF APPEALS
For the Ninth Circuit

JAMES HENRY AUDETT, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

BRIEF FOR THE UNITED STATES

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FILED

JAN - 2 1959

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OPINION BELOW

The judgment of the District Court was rendered without an opinion.

JURISDICTION

On January 25, 1956, a two count indictment was rendered against the appellant in the United States District Court for the District of Idaho, charging in the first count that on or about October 29, 1953 James Henry Audett attempted to enter and entered the First National Bank of Cottonwood, Cottonwood, Idaho, deposits of which at said time were insured by the Federal Deposit Insurance Corporation, with the intent to commit in such bank the crime of larceny, in violation of the provisions of 18 U.S.C., Section 2113. Count II of the indictment charged that on or about the 29th day of October, 1953, in the District of Idaho, Central Division, James Henry Audett took and carried away from the First National Bank of Cottonwood, Cottonwood, Idaho, the deposits of the said bank in the amount of \$30,000.00, which was in the care, custody, control, management, and possession of the said bank, and that at said time and place the deposits of said bank were insured by the Federal Deposit Insurance Corporation, in violation of 18 USC 2113. (R. 3-4)¹ Jurisdiction was conferred on the District Court by 18 U.S.C., Section 3231. After a jury trial, appellant was found guilty as charged. (R. 14) He was sentenced to imprisonment for twenty years on Count 1 and ten years on Count II, sentences to run concurrently. Sentence was imposed and judgment entered

¹/References preceded by "R" are to the Transcript of Record; references preceded by "Tr." are to the Transcript of proceedings upon trial; references preceded by "Br." are to the Appellants brief.

on the 10th day of April, 1956. (R.14-15) Notice of Appeal was filed on April 18, 1956 by his attorney, Frank E. Meek, (R. 20-21) and by the defendant himself in a written letter to the Court on April 21, 1956. (R. 21-22) The jurisdiction of this court is invoked under 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether appellant was deprived of a fair trial within the meaning of the due process clause of the United States Constitution, Amendment 5, as a result of one of his counsel being a United States Commissioner for the District of Idaho.

2. Whether the appellant's conviction was obtained in violation of his rights under the Constitution, Article 6, for the reason that counsel who appeared for him failed to present any defense whatsoever.

3. Whether there was sufficient evidence to sustain the judgment on Counts I and II, or either of them.

4. Whether the court committed prejudicial error in refusing to grant the motion for judgment of acquittal.

5. Whether the trial court committed prejudicial error in its instructions to the jury on the subject of testimony of alleged accomplices.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States:

Fifth Amendment

No person shall be held to answer for a capi-

tal, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C., Sec. 2113. *Bank Robbery and Incidental Crimes (portion applicable to this charge)*

* * * * *

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or

such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both;

* * * * *

Federal Rules of Criminal Procedure

Rule 52 — Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Appellant's statement of the case (Br. 1-3) is inadequate and incomplete and in many respects contains statements of fact not appearing in the record. Accordingly, the Government submits the following summary of the evidence and record.

The first count of the indictment charging the defendant with attempting to enter and entering the First National Bank of Cottonwood, Cottonwood, Idaho, alleges that on or about the 29th day of Oct-

ober, 1953, the defendant, James Henry Audett, in the District of Idaho, Central Division, attempted to enter and did enter the First National Bank of Cottonwood, Cottonwood, Idaho, the deposits of which bank were at said time insured by the Federal Deposit Insurance Corporation, with intent to commit in such bank the crime of larceny. The second count of the indictment charged that on or about the 29th day of October, 1953, in the District of Idaho, Central Division, James Henry Audett took and carried away from the First National Bank of Cottonwood, Cottonwood, Idaho, the deposits of which bank were at said time insured by the Federal Deposit Insurance Corporation, money, property, and things of value, the total value of which was \$30,000.00.

During all proceedings herein, James Henry Audett was represented by Frank Meek, attorney at law, Caldwell, Idaho, and was assisted by his partner, Dean E. Miller. At the time of the trial, Dean E. Miller was a United States Commissioner, residing at Caldwell, Idaho. (R. 8-9, Tr. 36-37) James Henry Audett knew this and in writing waived any objections he had thereto. The written waiver read in words and figures as follows:

“I, James Henry Audett, hereby certify that I have read the above and foregoing letter, that I have been fully advised that Dean E. Miller is a United States Commissioner, and hereby expressly waive any objection that I might have to his being such in the matter of being one of my attorneys in the above referred to matter.

/s/ James Henry Audett”

Thereafter, the defendant in open court was advised

by the Honorable Chase A. Clark, District Judge, as follows:

"The Court: Before we continue to select a jury for this case, I have a matter to take up here. The Defendant being present, it has come to the attention of the Court that it might be well to see if the Defendant is fully advised that Mr. Miller, who is of counsel for the Defendant, is a Commissioner, —a United States Commissioner for the District of Idaho. You are, of course, aware of that?

The Defendant: Yes, sir.

The Court: And you, Mr. District Attorney, are aware of that?

Mr. Furey: Yes, Your Honor.

The Court: Do you waive any question as to his appearing here as counsel for you, Mr. Audett?

The Defendant: Yes, sir." (Tr. 36-37)

All papers filed for and in behalf of the defendant were signed in person and/or by Frank Meek, his attorney. (R. 9, 21, 22, 23, 24) The defendant plead not guilty to each count of the indictment. A jury trial was had, beginning on the 9th day of April, 1956, at 10 o'clock a.m., and on April 10, 1956 a verdict of guilty was rendered on each count.

SUMMARY OF EVIDENCE

The evidence to support the verdict may be summarized briefly as follows:

James Henry Audett and Donald Duane Hall, in the latter part of September, 1953, met at Portland, Oregon. (Tr. 40) During this meeting the defendant inquired of Donald Duane Hall as to how he was do-

ing and if he was making any money and if he was hard up for money, to which Mr. Hall, a twenty year old youth responded to the affirmative. Mr. Hall was then asked by the defendant if he wanted to burglarize a bank, and on the first occasion declined the offer. (Tr. 40-41) Approximately two weeks later, Walter Clyde McClure and Hall drove over to Audett's place and talked to Audett, and discussed bank burglaries with him. At that time McClure and Hall advised Audett that they would accept Audett's proposition on bank burglaries and would go with him. Audett then asked Hall and McClure to pick up some burglary tools (Tr. 42-43), which Mr. Hall admits that he did. The three of them drove up the Washington side of the Columbia River into Spokane and on to Colton, Washington, and attempted to burglarize a bank there, but were unsuccessful. (Tr. 45, 94) The three of them stayed in Lewiston, Idaho that night under assumed and fictitious names. The next morning they drove to Cottonwood, Idaho and looked at several places on the way. After looking over the Cottonwood bank, they drove on to Arco, Idaho, and on the 28th day of October, 1953 returned to Cottonwood, and cased the bank. (Tr. 94) After darkness had settled over the area, they entered the Cottonwood bank, in accordance with a plan originated by Audett, by breaking a skylight and lowering a rope coil through the opening and having Mr. Hall slide down the rope. Mr. Hall then opened the door to the rear alley in order that McClure and Audett could enter. (Tr. 46-49, 92) After gaining entry to the building, the appellant supervised the removal of the bricks from the safe in order to gain entry thereto. After the bricks were remov-

ed, Audett, followed by McClure, entered the vault containing the bank deposits and returned with a little "leather secretary" filled with money removed from safe deposit boxes. (Tr. 50-51, 93) In addition thereto, certain silver and gold coins, together with gold dust, were removed and taken by these three subjects, the total value of the property taken being the sum of \$30,000.00. After the parties left the scene of the burglary this money and property was divided evenly among the three aforementioned persons. (Tr. 55, 91, 103) After the burglary was complete, these three subjects left the building through the back door, leaving the tools and rope on the inside where the burglary had occurred. (Tr. 52, 95) All of the defendants were arrested at a later date at Portland, Oregon, and part of the stolen money and property was recovered. Charges were filed against these three charging violation of the bank burglary statute. Donald Duane Hall and Walter Clyde McClure plead guilty to the charge. (Tr. 59, 90) The appellant pleaded not guilty and the trial aforementioned was had. (R. 10) Both Donald Duane Hall and Walter Clyde McClure were called as Government witnesses and testified to the facts hereinbefore set forth and, in addition thereto, the Government called the following witnesses:

W. W. Flint — President of the First National Bank of Cottonwood, Cottonwood, Idaho (Tr. 109-126)

Joseph Kuder — Town Marshal of Colton, Washington (Tr. 130-131)

Edward Mayer — Federal Bureau of Investigation, Lewiston, Idaho (Tr. 117-125)

Frederick Francis Thimmesch — Night Clerk,

Raymond Hotel, Lewiston, Idaho. (Tr. 126-130)

The defendant did not call witnesses in his behalf.

ARGUMENT

I

The Appellant Was Not Deprived of a Fair Trial Within the Meaning of the Due Process Clause of the United States Constiution as a Result of One of His Counsel Being a United States Commissioner.

The Fifth and Sixth Amendments of the Constitution which are set out at length in appellant's brief were enacted for the purpose of protecting persons charged with crimes, affording protection to the accused from being compelled to make self incriminating statements, and to guarantee his right to counsel. Certainly no violation of the Fifth Amendment can be shown, and the court went to extraordinary lengths to give the protection provided for in the Sixth Amendment of the Constitution. The court will note the contents of the letter which was signed by the appellant himself and by Frank E. Meek, attorney at Law, who was representing the defendant, which was submitted to the Office of the United States Attorney and filed with the court prior to the date of the trial. For purposes of reference, this letter is set out and reads as follows:

"Dear Sir:

"As you know, I discussed recently with you the fact that my partner, Dean E. Miller, is a duly appointed, qualified and acting United State Commissioner, my purpose being to ascertain whether in your opinion it would be ne-

cessary for him to resign as such because of this firm's employment by James Henry Audett to represent him in his defense against the indictment filed against him, and upon which he is to be arraigned on April 2nd, in the Federal Court Room at Moscow, Idaho.

"I also informally discussed this matter with Judge Clark.

"This is to advise you that our client, James Henry Audett, has been fully advised of this matter and of the fact that Mr. Miller is a United States Commissioner, and as a matter of fact, will be asked to read this letter before it is mailed to you, and to endorse thereon his waiver of any objection he might have to the fact Dean is a United States Commissioner.

"He is further being advised that at the time of his arraignment he should make an oral waiver of any objection he might have in the matter.

Yours very truly ,

MEEK & MILLER

/s/ By FRANK E. MEEK

FRANK E. MEEK

FEM:1r

WAIVER

I, James Henry Audett, hereby certify that I have read the above and foregoing letter, that I have been fully advised that Dean E. Miller is a United States Commissioner, and hereby expressly waive any objection that I might have to his being such in the matter of being one of my attorneys in the above referred to matter.

/s/ JAMES HENRY AUDETT" (R. 8-9)

It will be noted that not only had Mr. Meek consulted with the court and the United States Attorney but he obtained written consent from the defendant that Mr. Miller appear as one of counsel in such action. It should be further noted by the court that no allegation is made on the part of the appellant that Mr. Miller had performed any official functions on behalf of the United States in this particular case, but the said appellant is trying by innuendo to accuse counsel, Dean E. Miller, of a violation of the code of ethics and a violation of moral responsibility, merely because he had the power to act through an appointment by the court on matters within his jurisdiction. He challenges the moral integrity of Mr. Miller, stating that Mr. Miller could not be honest because he was an employee of the United States Government in a limited capacity. The court will note that the entire proceedings was under the supervision of Frank E. Meek, attorney for the appellant, and that Mr. Meek signed all papers and pleadings filed with the court on behalf of the appellant in this action, and there is a very definite attempt on the part of the appellant in his brief, which is filed with the court, to attribute all acts and results that counsel obtained on his behalf to be the responsibility of Mr. Miller alone. The Government feels that if Mr. Audett had any objection to Mr. Miller's conduct at the trial, that some mention of such fact should have been made before the completion of the trial or before the verdict was rendered, rather than proceed to take his chances on the outcome of the trial and, because the verdict was adverse, complain that his counsel conducted themselves in such a manner as to in fact amount to no representation at all.

As stated in the case of *Merritt v. Hunter*, 170 F.2d 739, 741:

“One accused who appears before the court with counsel employed for his defense is not deprived of his constitutional right to the assistance of counsel merely because in retrospection he concludes that such representation did not meet his standards of effectiveness.”

No other conclusion can be reached other than that the defendant is using the “sour grapes” approach to this particular question of representation.

The court was put in a very difficult situation because one of counsel chosen by the defendant was a United States Commissioner. The trial court, however, fully advised the defendant and protected his rights in the trial as is reflected by the following excerpts from the record:

“The Court: Before we continue to select a jury for this case, I have a matter to take up here. The Defendant being present, it has come to the attention of the Court that it might be well to see if the Defendant is fully advised that Mr. Miller, who is of counsel for the Defendant, is a Commissioner, —a United States Commissioner for the District of Idaho. You are, of course, aware of that?

The Defendant: Yes, sir.

The Court: And you, Mr. District Attorney, are aware of that?

Mr. Furey: Yes, Your Honor.

The Court: Do you waive any question as to his appearing here as counsel for you, Mr. Audett?

The Defendant: Yes, sir.” (Tr. 36-37)

The court was familiar with the constitutional guarantees of the Fifth and Sixth Amendments and was also familiar with the rule:

“The right to the assistance of counsel, granted by the Sixth Amendment, includes the right to counsel of defendant’s choosing.”

—11 Cyc. Fed. Proc., Sec. 39.77, p. 57;
United States v. Bergamo, 154 F.2d 31,34.

This rule is further explained in the case of *Glasser v. United States*, 315 U.S. 60, 71:

“Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to preserve the right to jury trial for an accused, Mr. Justice Sutherland said that such duty ‘is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.’ *Patton v. United States*, 281 U.S. 276, 312-313. The trial court should protect the right of an accused to have the assistance of counsel. ‘This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear

upon the record.' *Johnson v. Zerbst*, 304 U.S. 458, 465."

One represented by counsel is not denied due process of law, merely because the court permits the defendant to acquire counsel of his own choosing, when the choice is intelligently made. It is respectfully submitted that the appellant in this instance was fully advised as to his constitutional rights to counsel and was advised of the full facts leading up to the employment of Mr. Frank E. Meek and Mr. Dean E. Miller. It might be further noted by the court that this very defendant has had prior experience in the defense of similar matters in prior cases. See *Audett v. United States* 132 F.2d 528. This case involved the same appellant appealing from a conviction on a similar charge. It cannot be said that Mr. Audett was so unfamiliar with the proceedings in the United States District Court that he could not intelligently employ counsel. It might be noted further from the record that Mr. Audett is so well versed in the life of a criminal and the proceedings to which a criminal is subjected to that he wrote a book entitled "Rap Sheet", which was reputed to be a good seller. (R. 32, Tr. 89.)

Counsel for appellant in the brief refers at length to Title 28 U.S.C., Sections 604 and 607. It is respectfully submitted that such sections have nothing to do with the Office of the United States Commissioner or its duties or functions, since the court is well aware of the fact that the Administrative Office of the United States Courts is an entity separate and apart from the office of the Court itself. The United States Commissioner is an officer of the court and his duties are governed under the provisions of

Chapter 43, Title 28, Sections 631 to 639. Title 28, Section 631 (b) contains the only limitations found, other than administrative regulations, governing the conduct of the United States Commissioners. Subsection (b) reads as follows:

“A person holding any civil or military office or employment under the United States or who is employed by any justice or judge of the United States, shall not at the same time hold the office of United States Commissioner. This subsection shall not apply to a part-time referee in bankruptcy nor shall it apply to a clerk or deputy clerk of a court of the United States whose appointment as commissioner is approved by the Director of the Administrative Office of the United States Courts, but the Director may fix the aggregate amount of compensation to be received for performing the duties of commissioner and clerk or deputy clerk.”

There are no limitations other than the ethical arguments on the outside functions of the United States Commissioners, other than those stated in Subsection (b). Assuming *arguendo* that the defense of an accused made by a United States Commissioner in a United States District Court is not to be desired, we feel that the facts of this case do not warrant reversal upon that particular point, in light of the protective measures taken by the court to assure itself that the defendant made his decision intelligently and understandingly, and in light of the fact that Frank E. Meek was his chief attorney, and that Mr. Miller merely assisted in the defense of the matter. It is the Government's position that if any error was committed by reason of the fact that Mr. Miller was per-

mitted to participate in the defense of this matter it was harmless error, which error, defect, and irregularity did not affect the substantial rights of the defendant. See Rule 52, Federal Rules of Criminal Procedure.

This case is to be distinguished from the case cited in appellant's brief of *United States v. Hamilton*, 97 Fed. Supp., 123, 128, since the Hamilton decision was based upon an alleged irregular comment by Government counsel in his closing argument to the jury, and the question therein resolved was whether the appellant's constitutional guarantee against the right of self-incrimination was violated. It had nothing to do with the employment or conduct of defendant's counsel. The appellant has not raised any question pertaining to a violation of this right in his trial.

II

The Appellant Was Not Deprived of his Rights to Effective Assistance of Counsel in Violation of His Rights Under Article 6 of the United States Constitution.

Appellant argues throughout his brief that he was deprived of his constitutional right to assistance of counsel because counsel did not produce any witnesses upon which to base a defense and because defendant's counsel did not cross examine the witnesses more extensively. It would be an onerous burden for defense counsel to assume to be in the position of being compelled to manufacture witnesses in order to provide the defendant with a defense. No mention has ever been made by defendant that he was denied the privilege of having witnesses called in his behalf until his brief was filed with the court.

Counsel for appellant so admit in their brief. (Br. 14) It seems to be a very novel theory to have a jury's verdict set aside upon matters outside the record, particularly when these facts outside the record are in direct contradiction of the facts contained within the record. It is shown that the court gave the defendant an opportunity to produce any and all witnesses he desired and that notwithstanding, the defendant rested and made a motion for an instructed verdict. (Tr. 131-132) It appeared that the whole theory of the defense was that the Government did not produce sufficient evidence upon which a conviction of guilty could be sustained. The motion for an instructed verdict of acquittal was denied. (Tr. 132) It is believed that counsel for the appellant stated the principal governing these particular situations very appropriately on page 13 of their brief, wherein it is stated:

"It is easy, of course, for subsequent counsel in the ordinary case to frame better questions; for military strategists to demonstrate how lost battles might have been won. * * *"

That is exactly what appellant's counsel appear to be doing here. The question is asked by counsel:

"Is there a searching cross-examination of the young convicts who are testifying * * * against appellant?"

(Tr. 60 through 89) Recording of Mr. McClure's cross examination occupied twice as much space in the transcript as did his direct examination by the Government. (Tr. 97 through 109) It can be said from an examination of the testimony of these two witnesses that they were telling the truth and that further cross examination would only bring out

more details of the actual commission of this crime.

“Mere dissatisfaction with the results obtained through the efforts of defendant’s attorney is insufficient to invoke the protection of the Sixth Amendment, * * *”

—*Kinney v. United States*, 177 F.2d 895;
11 Cyc. Fed. Proc., Sec. 39.77, p. 58.

Both the defendant’s trial counsel have shown that they are capable attorneys and represented the appellant very faithfully and conscientiously in the trial of this matter and they are to be commended for undertaking the defense in this appellant’s behalf in light of the insurmountable obstacles that they were compelled to face in such an undertaking.

Unless defendant’s representation by self-employed counsel was such as to make the trial a farce and a mockery of justice, mere allegation of incompetence of counsel will not suffice for the reversing of the trial court’s decision and the granting of a new trial. See *United States v. Malfetti*, 125 F. Supp. 27; 11 Cyc. Fed. Proc., 1957 Supp., Sec. 39.77, p. 18.

We might refer in this case to a quote from the decision of *Mitchell v. Thompson*, 56 F. Supp. 683, 686 and apply it to the facts in this instance (said case being cited on page 8 of appellant’s brief) :

“I am inclined to the view that when one puts his attorney’s conduct of a case in issue, as this petitioner has done, he thereby waives the privilege as to confidential communications between him and his attorney, which are relevant to that issue. It might well be that actions or omissions on the part of an attorney, now offered as proof of lack of skill or preparation, were induced by the direct command of the client. However, I

preferred to err in favor of sustaining the privilege, but in so ruling I called petitioner's attention to the possibility that I might infer from the assertion of the privilege that the excluded evidence would not be helpful to his cause and I directed his consideration specifically to the rule that in this proceeding the burden of proof was upon the petitioner. *Johnson v. Zerbst, supra*"

A client can certainly never accuse his attorney of inefficiency and misconduct merely because no witnesses are produced on his behalf, when the failure to produce such witnesses is the fault of the defendant in failing to advise his attorney of any witnesses available which would assist him in the defense. The record discloses that no witnesses were ever requested, nor subpoenaed, on the part of the defendant and there is no request of record made by the appellant personally or through counsel. The blazing general statements of the law made by appellant in his brief certainly have no application in the factual situation we have here under consideration, since they want the circuit court to assume facts which do not appear of record as being the true facts surrounding the trial of this action and, based upon such assumed facts, to reverse the decision of the trial court. The plain fact of the matter is there was no defense which the appellant's counsel could assert in defendant's behalf, because the witnesses produced by the Government positively and conclusively placed the responsibility for the commission of this crime upon the shoulders of the appellant, and that any witnesses called to testify otherwise could certainly not prove otherwise in

light of such overwhelming evidence.

This particular situation is to be distinguished from that set out in the case of *Dusseldorf v. Teets, Warden*, No. 13,337, June 30, 1953, (The decision of which was later withdrawn for technical reasons.) In that particular instance a request was made by the defendant that he be permitted to take the stand and his counsel refused to let him do so. No such situation existed in this instance.

III

There Was Sufficient Evidence to Sustain the Verdict and Judgment on Counts One and Two, and Both of Them.

In the brief filed by appellant the contention was made that there was insufficient evidence on which a conviction could be sustained. The record is replete with evidence showing: (a) burglary was committed; (Tr. 46-53, 92-93, 112, 118-120)

(b) that James Henry Audett was the person responsible for the burglary (Tr. 46-53, 92-93); and (c) the exact method used by the three aforementioned subjects in committing the burglary and the part that each person played in the prosecution of said burglary. (Tr. 46-53) It was further proved that the three subjects divided equally the monies and property taken in the burglary (Tr. 55, 91, 103) and no other explanation could be made as to how the burglary occurred other than that mentioned by the several witnesses during the course of the trial. The jury had all these facts before it in arriving at the verdict, and after receiving the instructions of the law applicable, its verdict was returned. The appellant can point out no instance where the evidence was insufficient if the jury believed the testimony

that was placed before it by the several Government witnesses.

Appellant complains that he was convicted on uncorroborated testimony of alleged accomplices. The rule applying in Federal courts as to accomplices' testimony has been stated on many occasions, and a clear statement of this rule is found in 11 Cyc. Fed. Proc., Sec. 47.171, p. 705, wherein it is stated:

"The federal courts hold that a conviction may be sustained on the uncorroborated testimony of an accomplice, or a codefendant; and a *state statute to the contrary is not controlling*. * * *"
(emphasis added)

"The credibility of the accomplice and the weight to be given his testimony are within the peculiar province of the jury and are without the boundary of judicial review. The jury may credit the uncorroborated testimony of an accomplice if after careful scrutiny the jury believes such testimony.

See *Gormley v. United States*, 167 F.2d 454; *Banning v. United States*, 130 F.2d 330, certiorari denied 317 U.S. 695, 87 L.Ed. 556, 63 Sup. Ct. 434; *Burton v. United States*, 175 F.2d 960; *Doherty v. United States*, Ninth Circuit, 230 F.2d 605; *Caminetti v. United States*, 242 U.S. 470, 495, 61 L.Ed. 442, 37 Sup. Ct. 192; *Holmgren v. United States*, 217 U.S. 509, 523-524, 30 Sup. Ct. 588, 54 L. Ed. 861; *Krulewitch v. United States*, 1949, 336 U. S. 440, 454, 69 Sup. Ct. 716, 93 L. Ed. 790.

Appellant further urges that he was deprived of a fair trial by reason of the fact that it is to be presumed that the accomplices received promises of a reduced sentence *in exchange for merely a little per-*

jury. (Br. 19) It appears that this is another violent accusation from which a very serious conclusion was reached, when it appears that there is nothing within the record to support such a statement. The position assumed by the appellant in this instance is ridiculous and irresponsible. Surely if there was any truth to be attached to the appellant's contentions in this particular instance, there would be some support in the record at one point or another. It is respectfully submitted that the court had all the facts before it when it passed sentence on each and every one of the subjects. There is a presumption of regularity attached to all judicial proceedings which must be overcome by the advocate if the case is to be reversed by reason of the alleged irregularities. Certainly, the appellant has failed in all respects insofar as this particular contention is concerned, since presumption of regularity of an official action can be overcome only by clear evidence to the contrary. (*Reines v. Woods*, 192 F.2d 83.)

Respectfully submitted,
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